

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Petition for Declaratory Ruling: Lawfulness of Incumbent Local Exchange Carrier Wireless Termination Tariffs)	CC Docket No. 01-92
)	
Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers)	CC Docket No. 95-185
)	
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996)	CC Docket No. 96-98
)	

**Comments of the Missouri Independent Telephone Company Group
Regarding the September 6, 2002 Petition for Declaratory Ruling filed by
T-Mobile USA, Western Wireless Corporation, Nextel Communications, Inc.,
and Nextel Partners, Inc.**

Introduction

The Missouri Independent Telephone Company Group (MITG) consists of seven small rural incumbent local exchange companies operating in the state of Missouri.¹ Three members of the MITG, Alma, Choctaw, and MoKan, have in effect Wireless Termination Service Tariffs, approved by the Missouri Public Service Commission (MoPSC) and in effect since February of 2001. The Wireless Termination Service tariffs of Alma, Choctaw, and MoKan are substantially the same as those adopted by many

¹ The MITG members are Alma Communications Company, d/b/a Alma Telephone Company, Chariton Valley Telephone Corporation, Choctaw Telephone Company, Mid-Missouri Telephone Company, Modern Telecommunications Company, MoKan Dial Inc., and Northeast Missouri Rural Telephone Company.

other small rural Missouri ILECs. These Wireless Termination Service tariffs are the apparent object of the petition of T-Mobile, Western Wireless, and Nextel.

The other four MITG members have no such tariff. They own and operate their own access tandems. Nevertheless, in Missouri Southwestern Bell Telephone Company (SWBT) and the wireless carriers have sent wireless-originated traffic to MITG on an “inter-tandem” transported basis. This traffic is delivered over SWBT’s access trunk to the MITG tandem company tandems. Both SWBT and the wireless carriers have refused to pay compensation for this traffic. This traffic is interexchange carrier traffic for which access compensation is due. It is not different than wireless-originated traffic carried by AT&T and delivered to a MITG access tandem, for which AT&T is responsible to pay, and indeed has paid, terminating access compensation.

Collectively, the MITG companies have had years of experience, in private negotiations, and in contested proceedings before the MoPSC, contending with the positions of CMRS providers such as T-Mobile (formerly Voicestream), Western Wireless, and Nextel (petitioners) with respect to wireless originated traffic terminating to the MITG companies.

The MITG companies agree with petitioners that wireless termination tariffs are not the preferred mechanism for establishing reciprocal compensation arrangements between LECs and CMRS providers. The MITG agrees that the preferred mechanism is an interconnection/reciprocal compensation agreement developed and approved pursuant to the 1996 Act. The MITG has not fully considered the propriety or advisability of attempting to obtain “reciprocal” compensation arrangements via tariff.

What is important for the FCC to consider here is that the Missouri Wireless Termination Tariffs in question are *not* reciprocal compensation arrangements. They are tariffs covering only the termination of wireless to landline traffic not the subject of an approved reciprocal compensation agreement. The tariff rate does not purport to be a reciprocal compensation rate. The tariff does not purport to apply to landline to wireless traffic terminating to CMRS providers. The tariff does not purport to apply a rate to landline to wireless traffic.

The MoPSC specifically decided that these tariffs were *not* reciprocal compensation arrangements, and were *not* subject to the standards set forth in sections 251 and 252 of the Telecommunications Act of 1996. The MoPSC stated the compelling reason for approving the tariff was the failure of the CMRS providers to effectuate reciprocal compensation arrangements. The MoPSC told the CMRS providers that if they were not satisfied with this tariff, they could simply avail themselves of the section 251/252 interconnection/reciprocal compensation mechanisms under the Act. For the last 1 and ½ years since this MoPSC decision, CMRS providers in Missouri have persisted in their continued failure to negotiate and/or arbitrate reciprocal compensation interconnection agreements.

In their Petition, petitioners inaccurately describe the nature, intent, purpose, and history underlying the approval of these tariffs in Missouri. In failing to accurately describe the tariffs, and the history underlying their approval, petitioners mislead the FCC.

Missouri History

At the enactment of the Telecommunications Act of 1996 (Act), section 251(g) preserved existing compensation mechanisms then in place. For wireless originated traffic transported through the tandem of RBOC Southwestern Bell Telephone Company (SWBT) for termination to MITG companies, SWBT as an interexchange carrier paid terminating access charges to the MITG companies. SWBT itself provided this function via a state tariff, its PSC Mo No 40 Wireless Interconnection Service Tariff.²

On June 5, 1997, over a year after enactment of the Act, SWBT filed proposed modifications to that tariff. The purpose of the modifications was, for purposes of traffic terminating to third party LECs such as the MITG, to terminate SWBT's function at its meetpoint with the third party LECs, thereby eliminating its obligation to pay terminating access charges.

Over objection, on December 23, 1997, the MoPSC approved SWBT's tariff change, effective February 5, 1998, with a condition:

“Wireless Carriers shall not send calls to SWBT that terminate in an Other Telecommunication Carriers's network unless the wireless carrier has entered into an agreement with such Other Telecommunications Carriers to directly compensate that carrier for the termination of such traffic.”³

Wireless Carriers and SWBT also entered into approved interconnection agreements containing reciprocal compensation arrangements. While a few were effective prior to the February 5, 1998 effective date of SWBT's tariff change, most

² The SWBT state approved tariff for terminating wireless traffic has never been challenged by the wireless carriers. Presumably this is because they have pursued section 251/252 interconnection/reciprocal compensation mechanisms with SWBT.

became effective after February 5, 1998. Although these agreements addressed traffic destined to be “transported and terminated”⁴ on the facilities of the MITG companies, the MITG companies were not provided an opportunity to participate in these negotiations. Like the SWBT tariff, these agreements also contained provisions that the wireless carriers were to obtain agreements with third party LECs prior to sending traffic destined for third party LECs.

Wireless Carriers, including petitioners, failed to comply with the terms of the revised SWBT tariff, and failed to comply with the terms of the approved agreements. They sent traffic to SWBT destined for the MITG companies, absent an agreement with the MITG companies to compensate them for this traffic. The MITG companies billed the wireless carriers for the traffic terminated, as reported by SWBT, but the wireless carriers refused to pay. SWBT has refused to pay. In some cases wireless carriers refused because they had no agreements with the MITG companies that they were required to have before sending the traffic they refused payment for. Some wireless carriers used the billings to make interconnection requests, thus initiating the section 252 reciprocal compensation negotiations process.

In interconnection/reciprocal compensation negotiations, the MITG companies requested to negotiate for the same structures with the same protections as petitioners had already voluntarily agreed to in their approved agreements with SWBT:

³ December 23, 1997 Report and Order in Case No. TT-97-524, *“In the Matter of Southwestern Bell Telephone Company’s Tariff Filing to Revise its Wireless Carrier Interconnection Service Tariff, PSC Mo No 40”*.

⁴ For the traffic destined for the MITG companies, only the MITG companies provide both transport and termination. SWBT only provides part of the transport. Under the Act and FCC rules, only the MITG companies are ILECs entitled to negotiate the terms of reciprocal compensation for this traffic.

1. traffic exchanged on a dedicated (direct connection) that would allow the MITG to measure, record, jurisdictionalize, and bill for the traffic based upon their own systems and facilities;
2. no responsibility to pay terminating reciprocal compensation to the wireless carriers for the termination of 1+ dialed calls routed to and carried by the customers' presubscribed interexchange carrier until a direct connection agreement was approved, authorizing this traffic to be locally dialed without "slamming" the call.

In addition the MITG companies requested that the negotiations include payment for the traffic terminated to them in the past, in violation of tariff and agreements.

In response, the wireless carriers claimed that SWBT was obligated to "transit" the traffic in question to the MITG companies, who in turn were obligated accept "transit" traffic, and were obligated to negotiate reciprocal compensation arrangements over a "transited" common trunk (indirect connection) arrangement⁵, and were obligated to accept SWBT services in recording and reporting the traffic.⁶ They further claimed that the MITG companies were responsible for paying terminating compensation on calls terminated to the wireless carriers by the IXC carrying the call (for which the wireless carrier is already entitled to collect terminating access⁷). Finally, they claimed that the MITG negotiating requests constituted "bad faith", and unilaterally declared "defacto bill

⁵ SWBT does not accept traffic on such a "transit" basis. The Kansas Corporation Commission has ruled that forcing LECs to accept "transit" traffic would undermine their right or preference for their own direct interconnections. See the KCC August 7, 2000 Arbitrator's Order 5: Decision *In the Matter of the Petition of TCG Kansas City, Inc. for Compulsory Arbitration of Unresolved Issues with Southwestern Bell Telephone Company Pursuant to section 252 of the Telecommunication Act of 1996*, Docket No. 00-TCGT-571-ARB, at pages 25-26. The FCC has recently ruled that an ILEC has no obligation to transit traffic at TELRIC rates. See *In the Matter of the Petition of WorldCom, Inc. Pursuant to section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon-Virginia, Inc., and for Expedited Arbitration, et al.*, CC Docket No. 00-218, et al., Memorandum Opinion and Order, released July 17, 2002.

⁶ SWBT's summary report did not identify the jurisdiction of the call.

⁷ Declaratory Judgment, *In the Matter of Petitions of Sprint PCS and AT&T Corp. for Declaratory Ruling Regarding CMRS Access Charges*, WT Docket No. 01-316 at para. 12, released July 3, 2002.

and keep” was the reciprocal compensation structure in place.⁸ They failed to request arbitration of the negotiation, which was the remedy they were to use to obtain an approved reciprocal compensation arrangement. In fact, these wireless carriers have argued before the Missouri Court of Appeals, Western District, that they prefer *not* to follow the FCC procedure of requesting arbitration with the small rural ILECs of Missouri.

After 2 and ½ years of receiving no compensation, and obtaining no agreements, both of which were violation of MoPSC Orders approving tariffs and interconnection agreements, approximately 30 Missouri small rural ILECs, including Alma, Choctaw, and MoKan, filed the Wireless Termination Service tariffs which are the object of petitioners’ Petition. The tariff service was a termination service only. The tariff service would make it the obligation of the originating wireless carrier, as reported by SWBT, to pay terminating compensation. Wireless carriers intervened in opposition to the proposed tariffs.

The MoPSC issued its decision approving the Wireless Termination Service Tariffs on February 8, 2001.⁹ In that decision the MoPSC made the following statements, findings, and conclusions which illuminate the true nature of the tariffs at issue here:

- Although the wireless subscriber pays the wireless carrier for making such calls, and the wireless carrier compensates SWBT for transporting the traffic, no one has been compensating the small ILECs for the use of their networks in completing each such call. (p. 11)

⁸ There is no such thing as “defacto” bill and keep as a default compensation mechanism. The Commission can only impose a bill-and-keep arrangement upon a finding that two companies’ costs are symmetrical and the traffic between the two carriers is reasonably balanced and is expected to remain so. (*See* 47 CFR 51.705 and 51.713).

⁹ MoPSC Report and Order in TT-2001-139, “*In the Matter of Mark Twain Rural Telephone Company’s Proposed Tariff to Introduce its Wireless Termination Service*”, consolidated with the other tariff filings.

- SWBT's revised wireless tariff states wireless carriers shall not send calls to SWBT that terminate in an Other Telecommunication Carriers's network unless the wireless carrier has entered into an agreement with such Other Telecommunications Carriers to directly compensate that carrier for the termination of such traffic, however, SWBT has continued to carry traffic from CMRS providers to small LECs for termination, regardless of whether or not agreements exist between them. SWBT has done nothing to enforce this provision of its tariff. (p. 16, 21)

- Because the wireless-originated traffic continues to be terminated to subscribers of the small LECs at no extra cost to the CMRS carriers, there is no incentive for those carriers to enter into agreements with the small LECs. Since the implementation of SWBT's revised tariff in February of 1998, not a single such compensation agreement has been made between a CMRS carrier and a small LEC. (pp. 16-17)

- At present it is the norm that traffic between the small LECs and CMRS carriers is one-way traffic. This is because traffic to CMRS subscribers from the small LECs' subscribers is transported by IXCs and treated as toll traffic. (p. 17)

- The proposed Wireless Termination Service tariffs apply only to intraMTA, wireless to wireline traffic where the originating CMRS carrier and the terminating LEC are indirectly interconnected and the traffic is transported by an intervening LEC. The tariffs are expressly subordinated to Commission-approved interconnection and traffic termination agreements. The tariffs also do not apply to traffic which the CMRS carrier has arranged for another carrier, such as an IXC, to terminate. (p. 19)

- The Act does not state that reciprocal compensation is a necessary component of the tariffs of LECs or ILECs. Therefore the Commission concludes that Section

251(b)(5) simply does not apply to the proposed tariffs herein at issue. For the same reason the Commission concludes that the proposed tariffs are not unlawful under Section 251(b)(5). (pp. 29-30)

- The Act obligated the filing companies to negotiate interconnection agreements which must include reciprocal compensation arrangements. The filing companies are subject to mandatory arbitration under the Act. If there are aspects of these tariffs which the CMRS carriers do not like, they will take advantage of those provisions of the Act. (p. 30)

- The reciprocal compensation pricing standard of the Act provide guidance to state commission in the arbitration of agreements. Like the obligation to establish reciprocal compensation arrangements, the pricing standards of section 252 (d) do not apply to the proposed tariffs. For the same reason the tariffs are not unlawful under section 252(d). (pp. 32-33)

In essence, the MoPSC ruled that the tariffs filed by the Missouri rural ILECs provided a compensation mechanism for the rural ILECs for services rendered when the Act's procedures to obtain interconnection agreements/reciprocal compensation arrangements had not been completed.

Cole County Circuit Court Decision

The CMRS providers appealed the MoPSC Report and Order to the Circuit Court of Cole County, Missouri in consolidated Case No. 01CV323740. On November 26, 2001, the Circuit Court entered its *Findings of Fact, Conclusions of Law, and Judgment*, which stated in part:

- Wireless traffic is being delivered to the exchanges of the small companies in the absence of an agreement. Because there are no agreements in place between the small companies and the wireless carriers, the small companies are not being

compensated for the wireless traffic that is transited and terminated to them via SWBT. (p. 5)

□ The Small companies must be compensated for the use of their facilities. The wireless companies do not deny that the small companies should be compensated for terminating the wireless carriers' calls, but currently the small companies receive nothing for the calls that are terminated to their exchanges. No party denies that the small companies incur traffic sensitive costs for each of the wireless companies' calls that they terminate, and as wireless traffic continues to grow, the small companies will incur more and more of these new expenses over and above their current costs. (pp. 5-6)

□ The FCC's pricing rules, including the provisions that require the use of forward-looking economic costs, apply only to negotiated or arbitrated reciprocal compensation agreements under the Act. They do not apply to tariffs filed in the absence of such agreements. Thus, the only requirement for the small companies' tariffed rates is that they must be just and reasonable. The small companies' proposed rates satisfy this test. (pp. 9-10)

□ The FCC's reciprocal compensation pricing principles for intra-MTA traffic apply only to agreements approved pursuant to the Act. Absent an approved interconnection or reciprocal compensation agreement, the small companies may apply lawfully approved tariff rates. (p. 10)

□ Upon receipt of a request to establish a reciprocal compensation arrangement under the Act, the small companies have an obligation to negotiate reciprocal compensation arrangements for the transport and termination of telecommunications. Wireless carriers have the right to request such negotiations, and if the negotiations fail to produce agreement, then the Act provides that either carrier may petition the Commission to arbitrate any unresolved matters. Thus, even after the approval of the tariffs, the Act and each one of the tariffs provide a mechanism for the wireless carriers to establish a reciprocal compensation arrangement with the small companies just as they have done with SWBT. (pp. 10-11)

The Cole County Circuit Court of Missouri agreed with the Missouri PSC that the tariffs filed by the Missouri rural ILECs provided a compensation mechanism for the rural ILECs for services rendered to CMRS providers when the FCC procedures had not been pursued or completed to establish interconnection agreements/ reciprocal compensation arrangements.

Appeal to the Missouri Court of Appeals, Western District

Following the Judgment of the Circuit Court of Cole County, Missouri, the CMRS providers appealed to the Missouri Court of Appeals, Western District, where this matter is currently pending under Case No. WD60928. The Court of Appeals heard oral arguments on October 2, 2002. At oral argument, the wireless carriers argued that they prefer not to follow the FCC procedure of requesting arbitration with the small rural ILECs of Missouri. Instead of following the FCC procedures to establish reciprocal compensation arrangements through negotiation and arbitration, the wireless carriers are pursuing litigation in hopes that the courts will impose upon the small rural ILECs the negotiating conditions the wireless carriers prefer.

Complaint Proceeding

Following the approval of the wireless termination service tariffs by the Missouri Commission, many of the wireless carriers refused to compensate the rural ILECs pursuant to their approved tariffs for the traffic terminated to the exchanges of the rural ILECs. The MITG carriers filed suit with the Commission in Case No. TC-2002-57. Since filing this suit, which still pends, many wireless carriers have made payments under protest pursuant to the wireless termination service tariffs. All wireless carriers have represented that they are in fact bound to adhere to the terms of the wireless termination

tariffs. This matter has been heard by the MoPSC in August, 2002, and is currently being briefed by the parties, with disposition sometime thereafter.

Missouri has jurisdiction over state tariffs

The Missouri Commission has carefully considered the issue of its jurisdiction over the parties and the subject matter of compensation on calls terminated to rural ILECs from wireless carriers. Following briefing of the issues by the parties in Case No. TC-2002-57, the Commission found in its *Order Regarding Subject Matter Jurisdiction*¹⁰:

- that it has the power to hear and determine complaints pursuant to Section 386.390.1 RSMo 2000. (p. 3)
- The complaining parties are public utilities subject to regulation by the MoPSC. (p. 3)
- The respondent CMRS providers are not public utilities subject to regulation by the MoPSC, but in the complaint case, respondents are customers of the complaining parties in that they originate and transport traffic intended for termination on the petitioners networks. (p. 4)
- The MoPSC has exclusive authority “to regulate and fix rates or charges for public utilities, and to classify those users or consumers to whom such rates or charges shall be applicable.” (pp. 4-5)

In sum, the MoPSC stated, “Based on these considerations, the Commission determines that it has jurisdiction to determine whether any charges are owed to Petitioners with respect to the traffic in question and, if so, how the charges are to be calculated. These are questions that necessarily require that the Commission classify

¹⁰ Missouri Public Service Commission’s *Order Regarding Subject Matter Jurisdiction*, Case No. TC-2002-57, issued February 14, 2002.

Respondents as customers of Petitioners and determine which tariffed rate applies to the transactions in question.”¹¹

Requested Relief from the FCC

The Wireless Carriers seek a declaratory ruling from the FCC pursuant to 47 USC § 332(c)(1)(B). Under § 332(c)(1)(B):

“Upon *reasonable* request of any person providing commercial mobile service, the Commission shall order a common carrier to establish physical connections with such service pursuant to the provisions of section 201 of this title. Except to the extent that the Commission is required to respond to such a request, this subparagraph shall not be construed as a limitation or expansion of the Commission’s authority to order interconnection pursuant to this chapter.”

This statute does not authorize the relief requested by Petitioners. Petitioners are not requesting the establishment of a physical connection. Instead they request a declaration that state approved tariffs, designed to establish an enforceable business relationship when no direct interconnection exists, are unlawful. The wireless carriers are not seeking to establish a direct connection under §332.

The need for the tariff was created because the wireless carriers refused to comply with their obligations under section 251 and 252 of the Telecommunications Act of 1996, their obligations under MoPSC Order approving SWBT’s Tariff, and their obligations under their interconnection agreements with SWBT. Section 251 and 252 of the Act establish a specific procedure for obtaining reciprocal compensation, a procedure that Petitioners, as requesting carriers, alone can compel.

¹¹ *Id.* at p. 5

Conclusion

The Wireless Termination Service tariffs in Missouri provide a compensation mechanism for wireless traffic terminated pursuant to an indirect interconnection to the rural ILECs' networks. It does not interfere with the wireless carriers' ability to interconnect with the rural ILECs, or their rights to obtain interconnection and reciprocal compensation under sections 251 and 251 of the 1996 Act.

The Missouri Public Service Commission has determined the wireless termination service tariffs are just and reasonable, and do not preclude wireless carriers from negotiating different terms and conditions they can avail themselves of pursuant to sections 251 and 252 of the 1996 Act.

Had the wireless carriers pursued and completed the FCC procedures to establish interconnection agreements and reciprocal compensation arrangements provided since 1996 by 47 USC Sections 251 and 252, there would be no controversy. Instead, the wireless carriers have refused to avail themselves of their section 251 and 252 rights and procedures. Instead, the wireless carriers have flaunted the FCC procedures under the '96 Act by not requesting interconnection agreements until bills for uncompensated traffic have been rejected, by subsequently not taking requested interconnection agreements/reciprocal compensation arrangements to arbitration to obtain a binding arrangement, by declaring the small companies' requests for direct interconnection bad faith, and then unilaterally declaring the traffic to be terminated pursuant to '*de facto*' bill and keep, a compensation scheme which does not exist, has not been agreed to or arbitrated, and which has not been ordered.

As a result, Missouri rural ILECs have been terminating the wireless traffic without compensation since February of 1998. The Missouri rural ILECs have been pursuing this issue informally with the wireless carriers and formally in complaint cases filed before the Missouri Public Service Commission and Courts.

The FCC should not address the wireless carriers' petition for declaratory judgment of the Missouri ILECs' wireless termination service tariffs until the issue has been finally determined in Missouri. The wireless carriers actions have necessitated these Missouri proceedings. The FCC acceptance of this petition will condone the wireless carriers wrongful actions and discourage parties from adhering to the 47 USC sections 251-252 processes.

ANDERECK, EVANS, MILNE,
PEACE & JOHNSON, L.L.C.

By _____
Craig S. Johnson MO Bar No. 28179
Lisa Cole Chase MO Bar No. 51502
The Col. Darwin Marmaduke House
700 East Capitol
Post Office Box 1438
Jefferson City, Missouri 65102
Telephone: (573) 634-3422
Facsimile: (573) 634-7822
Email: CJohnson@AEMPB.com

ATTORNEYS FOR MITG